Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of	)	
	)	
Children's Television Obligations	)	MM Docket No. 00-167
Of Digital Television Broadcasters	)	
	)	

To: Secretary, Federal Communications Commission

<u>REPLY TO OPPOSITION TO PETITIONS FOR RECONSIDERATION OF THE CHILDREN'S MEDIA POLICY COALITION</u>

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REPLY TO OPPOSITION TO PETITIONS FOR RECONSIDERATION OF THE CHILDREN'S MEDIA POLICY COALITION

Pursuant to Section 1.429 of the rules of the Federal Communications Commission ("FCC" or "Commission"), The Walt Disney Company ("Disney"),[1] by its attorneys, hereby files the instant reply ("Reply") to the opposition of the Children's Media Policy Coalition ("CMPC") to petitions for reconsideration ("Opposition") filed in the above-captioned proceeding.[2] As further set forth below, the Commission should reject the Opposition. Because Disney has addressed fully the issues raised by CMPC,[3] this Reply focuses on: (i) the 10% limit on preemptions; (ii) the revised definition of commercial matter; and (iii) the rules governing the display of website addresses in children's programming. Specifically, this Reply demonstrates that there is no reason for the Commission to depart from its prior flexible approach with respect to preemptions of educational/informational ("E/I") programming in the absence of any proven

[1] This Reply is submitted on behalf of certain entities controlled by The Walt Disney Company ("Disney"), as listed in its Petition for Reconsideration filed February 2, 2005 ("Petition").

[2] *See* Opposition to Petitions for Reconsideration of the Children's Media Policy Coalition, MM Docket No. 00-167, FCC 04-221 (filed Mar. 23, 2005) ("Opposition").

[3] *See* Petition, which Disney incorporates by reference herein.

harm. Furthermore, as further shown in this Reply, the revised definition of commercial matter contravenes legislative intent and broad application of the rules regarding websites is untenable.[4]

I. The 10% Rule Is Not Supported By Evidence and Does Not Afford Broadcasters Sufficient Flexibility

In its Opposition, CMPC argues that the Commission should retain its decision to limit preemptions of E/I programming to 10% per calendar quarter ("10% Rule") but supports a proposal that the Commission measure compliance with the 10% Rule over a one year period.[5] However, as Disney demonstrated in its Petition for Reconsideration ("Petition"), the 10% Rule, with or without such a modification, will have extremely harmful effects on broadcasters' programming decisions and their ability to schedule sports and children's programming during the periods most suited to meet the interests of their viewers.[6]

The 10% Rule places ABC in an untenable position because there is no reasonable way ABC can comply with this rule while simultaneously satisfying its obligations under its current sports contracts and continuing to air E/I children's programming on Saturday mornings. In its Petition, Disney established the harmful effect of the 10% Rule on its sports contracts. Some core programs included in ABC's traditional Saturday morning children's programming lineup must be preempted for live coverage of popular sports programming, particularly on the West coast where, for example, a college football game with a noon EST kickoff will air live in the Pacific time-zone at 9AM, thus conflicting with at least one hour of scheduled children's E/I programming. ABC is committed to serving its viewers in all time zones with live sports events,

[4] Disney responds to CMPC's arguments regarding the three hour processing guidelines by incorporating by reference herein its discussion of these guidelines in its Petition. *See* Petition, at 23-25.

[5] Opposition, at 8-9.

[6] Petition, at 14-15.

including premier events such as World Cup Soccer and the British Open golf tournament, both of which will air on Saturdays.[7] This high-quality live coverage of sports events is enjoyed by children and parents alike and there is no reason for the Commission to depart from its prior flexible approach with respect to preemptions of E/I programming.[8] Compliance with the 10% Rule undercuts ABC's ability to meet the needs of its viewers and could, in fact, force the migration of this high-value, popular live over-the-air sports programming to pay services.

CMPC contends that such a result is not necessary because broadcasters simply could move children's programming to times other than Saturday morning.[9] This alternative, however, is not in the public interest. ABC, like NBC and CBS, has aired its core children's programming on Saturday mornings for decades. ABC is committed to fulfilling the expectation of parents and interests of children that such programming will be aired on Saturday morning. Further, over the years ABC has experimented with different models for scheduling and distributing children's programming on weekdays and concluded that Saturday morning is the best place for children's programming. Absent evidence of any proven harm, there is no reason to modify the current rules which provide broadcasters with the requisite flexibility to serve their viewers and the public interest.[10]

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[7] Some ABC affiliates, and some regions of the ABC network, also carry additional sporting events such as local conference football games, all of which occur on fall Saturdays.

[8] In fact, data referenced in the Opposition demonstrates that sports programming is among the best rated programming among children ages 6-14. For example, the NFL divisional playoff games were among the top twenty highest rated programs among children ages 6-14 for the first two weeks of January 2005. *See* Opposition, at 13 (referencing data included in petition for reconsideration by 4Kids Entertainment, Inc., filed in the above-captioned proceeding).

[9] Opposition, at 12-13.

[10] As evidence that the current rules are harmful, CMPC relies on a study by the Media Bureau ("MB") in which the MB found that ABC, CBS, and NBC preempted nearly 10% of their E/I programming. Opposition, at 11-12. CMPC fails to acknowledge, however, that the MB also concluded in this study that the networks' preemption practices were "consistent with the

II. The Children's Television Act Does Not Permit the Commission to Modify Its Definition of Commercial Matter

In its Opposition, CMPC argues that the Children's Television Act of 1990 ("CTA") provides the Commission with authority to modify the commercial time limits by altering its definition of commercial matter.[11] A review of the legislative history of the CTA, however, demonstrates that this argument simply is incorrect. As Disney demonstrated in its Petition, the Commission's revised definition of commercial matter is contrary to the unambiguous intent of Congress when it enacted the CTA.[12] As CPMC acknowledges, Congress specified in committee reports that the definition of "commercial matter" should match the definition used by the Commission in its FCC Form 303.[13] This definition specifically excluded all same-channel promotions that do not promote a sponsor and for which no consideration is received.

CMPC does not provide any reason to stray from this clear Congressional intent. In support of its position, CMPC points to the Commission's conclusion that broadcasters receive "indirect consideration" for program promotions in the form of increased audiences.[14] CMPC

Commission's goals of maintaining scheduling continuity and predictability" and "advised the networks that their proposals for promoting and rescheduling preempted core programs would not run afoul of the children's television rules." Mass Media Bureau, *Three Year Review of the Implementation of the Children's Television Rules and Guidelines, 1997-1999*, at 5-6 (2001). CMPC further contends in its Opposition that the record "provides ample evidence that some television stations have excessively preempted children's educational programming." The only actual evidence in the record, however, shows that broadcasters continue to make a good faith effort to keep children's programming in regularly scheduled time periods.

[11] Opposition, at 14-15.

[12] Petition, at 5-7.

[13] According to CMPC, absent a "strong affirmative indication that [Congress] wishes the present interpretation to remain in place," the Commission generally is free to revise its definitions, such as the definition of commercial matter. Opposition, at 15. This general point is irrelevant in this context, however, because Congress already gave a "strong affirmative indication" when it specifically stated its intent that the definition of commercial matter should be consistent with the definition used in the FCC's former Form 303.

[14] Opposition, at 60.

fails to recognize, however, that in creating this "indirect consideration" rationale, the Commission disregarded Congress' express direction to treat program promotions where "consideration was received for such announcement[s]" differently from same-channel promotions for which no consideration was received.[15] Congress anticipated that only two distinct categories of program promotions would qualify as commercial matter, neither of which included same-channel promotions. Therefore, the Commission's revised definition contravenes Congress's clear intent.

Importantly, the FCC's revised commercial matter definition is unworkable not only for broadcasters but also for cable networks, a point CMPC fails to consider in its Opposition. In its Petition, Disney provided the Commission with a long list of practical problems for cable networks and broadcasters regarding implementation of the revised definition of commercial matter.[16] For example, because promotions of non-E/I programs would be considered commercial matter while promotions of E/I programs would not, cable networks—for the first time—would have to divide their programming into E/I and non-E/I categories, even though they, unlike broadcasters, are not obligated to schedule any weekly E/I children's programming. Moreover, the Commission would have to be prepared to examine all such determinations in the event of any audits or challenges to cable networks' compliance with commercial limits, thus entangling the Commission in micromanagement of content-based decisions (*e.g.* whether programming is educational) that it typically tries to avoid. Given that the Commission failed to

[15] *See* H.R. REP. NO. 101-385, at 15 (1989); S. REP. NO. 101-227, at 21 (1989).

[16] *See* Petition, at 9. For example, these issues include, among others, the following: What are the parameters for qualifying a program, movie, or series as E/I? Do all episodes of a series need to qualify as E/I for the series to be deemed E/I? If a series consists of E/I and non-E/I episodes, would a promotion for the series as a whole constitute non-commercial matter?

consider, or provide any justification for, these potential consequences, the Commission should reject CMPC's assertions and reconsider its revised definition of commercial matter.

III. The Commission Should Reconsider Its New Website Rules Because Broad Application of These Rules Is Untenable

CMPC urges the Commission not to rescind its rules prohibiting certain references to Internet websites in children's programming, including any displays of website addresses when the website uses characters from the programming to sell products or services ("Website Reference Rules" or "Rules").[17] According to CMPC, the Commission could address concerns that the Website Reference Rules are unclear or difficult to apply on a case-by-case basis, as each such concern arises.[18] However, given the vast number and content-related nature of issues raised by the Rules, case-by-case determinations would be untenable, especially from an enforcement perspective.

In its Petition, [19] Disney showed how the Website Reference Rules, as currently defined, could lead to a virtually unlimited number of unanticipated content-related issues.[20] For example, one of the Rules prohibits references to any website that uses host selling anywhere on that website, at any time, and is not limited to a set number of website pages. Thus, because this new rule applies to all levels of a website, it could prohibit Disney from using its characters in connection with marketing anywhere on its entire network of websites, even if that marketing is

[17] Opposition, at 22-24.

[18] *Id.* at 24.

[19] *See* Petition, at 18-19, 22-23.

[20] Additionally, Disney showed how the Website Reference Rules do not promote the original policy behind the traditional host selling rule. This concern is not present in the Internet context because, unlike television commercials, which run seamlessly together with television programming in a linear fashion and are programmed by others, accessing a website involves connection to an entirely different medium controlled and operated by the child or parent.

many clicks away from the website address displayed in a particular program and the website referenced in the program otherwise satisfies the Website Reference Rules. In this sense, the Commission is regulating Internet content even though it does not have jurisdiction to do so.

Moreover, the Website Reference Rules would be impractical from an enforcement perspective because the Commission will be required to intervene in countless numbers of cases as it attempts to provide guidance regarding compliance with the Rules. Effective Commission enforcement would require visiting and constantly re-visiting limitless number of website pages, as well as documenting what was contained on constantly changing website pages. Rather than waste valuable Commission resources to determine these issues on an *ad hoc* basis, the Commission should reject CMPC's suggestion and reconsider the Rules in their entirety.

IV. Conclusion

For the reasons discussed herein, and in Disney's Petition, Disney urges the Commission to reject the arguments set forth by CMPC in its Opposition and instead reconsider the 10% Rule, the revised definition of commercial matter, and the Website Reference Rules.

Respectfully submitted,

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April 6, 2005

Its Attorneys

CERTIFICATE OF SERVICE

I, Dayle Jones, of Akin Gump Strauss Hauer & Feld, L.L.P., certify that a copy of the foregoing **Reply to Opposition to Petitions for Reconsideration of the Children's Media Policy Coalition** on behalf of The Walt Disney Company, has been served by first class mail, on this 6th day of April, 2005, on the following persons at the addresses shown below.

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